

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

DORIAN LAMARR PRICE,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 330710

Circuit Court No. 15-4825-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
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APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

JUDGMENT APPEALED FROM AND RELIEF SOUGHT	i
TABLE OF AUTHORITIES	iii
STATEMENT OF QUESTIONS PRESENTED	v
STATEMENT OF FACTS AND MATERIAL PROCEEDINGS.....	1
I. BY STATUTORY DEFINITION, A FELONIOUS ASSAULT IS COMMITTED BY A PERSON WHO LACKS THE INTENT TO DO GREAT BODILY HARM. BECAUSE JUDGE SKUTT FOUND THAT DORIAN PRICE ACTED WITH THE INTENT TO DO GREAT BODILY HARM, AND THUS CONVICTED HIM OF ASSAULT WITH INTENT TO DO GREAT BODILY HARM, HE COULD NOT ALSO CONVICT HIM OF FELONIOUS ASSAULT.....	5
A. PUNISHMENT FOR BOTH OFFENSES VIOLATES DOUBLE JEOPARDY PRINCIPLES.....	6
B. THE VERDICTS WERE INCONSISTENT.....	8
II. WHERE THE PROSECUTION FAILED TO PRESENT EVIDENCE IN ITS CASE-IN-CHIEF TO SUPPORT THE FELON-IN-POSSESSION CHARGE, COUNSEL WAS INEFFECTIVE FOR NOT MOVING FOR A DIRECTED VERDICT BEFORE PUTTING ON A DEFENSE CASE THAT SUPPLIED THE MISSING EVIDENCE.....	10
SUMMARY AND RELIEF AND PROOF OF SERVICE.....	13

Attachment 1: Court of Appeals Opinion issued June 1, 2017

Attachment 2: *People v Strawther*, unpublished opinion per curiam of the Court of Appeals, issued 2-13-2007 (Docket No. 265911)

Attachment 3: *People v Davis*, ___ Mich App ___ (2017)

Attachment 4: *People v Mattie Harris*, unpublished opinion per curiam of the Court of Appeals issued Nov. 30, 2010 (Docket No. 294145)

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Dorian Lamarr Price

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The defendant-appellant, Dorian Lamarr Price Jr., appeals from a June 1, 2017, unpublished opinion of the Court of Appeals (Attachment 1 to this Application). By a 2-1 vote, the Court of Appeals affirmed Mr. Price's convictions for assault with intent to do great bodily harm (AWIGBH), felonious assault, carrying a concealed weapon, felon-in-possession-of-a-firearm (felon-in-possession), and felony-firearm. The convictions were entered after a jury trial in the Wayne County Circuit Court at which Judge Richard M. Skutt presided. Mr. Price now seeks this Court's review.

Mr. Price's appeal presents an opportunity for the Court to clarify whether or not a single act may support conviction for both AWIGBH and felonious assault. The Legislature has defined felonious assault as an assault made with a dangerous weapon "*without* intending to commit murder or inflict great bodily harm." MCL 750.82 (emphasis added). Mr. Price accordingly raised two challenges to his convictions for both AWIGBH and felonious-assault: Double Jeopardy, and inconsistent verdicts.

The Court of Appeals rejected the double-jeopardy claim for the same reason it did in *People v Strickland*, 293 Mich App 393, 401-02 (2011)—this Court's peremptory order in *People v Strawther*, 480 Mich 900 (2007). But *Strawther* was decided without the Court ever considering the argument made here: that there is no reason to invoke the *Blockburger* same-elements test to determine legislative intent when the legislative intent is already evident on the face of the statute.

This Court should grant leave to appeal to reconsider *Strawther*.

This Court should also grant leave to appeal to resolve confusion in the Court of Appeals about the inconsistent-verdict argument. The Court here split 2-1 on the question whether a judge

sitting as fact-finder may convict of both AWGBH and felonious assault. And while at least one other panel has agreed with the majority that a judge may do so,¹ another panel has more recently indicated that “mutually exclusive verdicts” such as these will not withstand appellate review even when entered by a jury. *People v Davis*, __ Mich App __ (July 13, 2007) (No. 332081) (attached) (vacating aggravated domestic assault conviction where defendant convicted of both that offense and AWGBH and where aggravated domestic assault defined as crime committed “without intending to commit murder or to inflict great bodily harm less than murder”).

The Court should grant leave to resolve the conflict.

Finally, the Court should grant leave to consider whether defense counsel’s failure to move for a directed verdict may be excused by the supposition that, even if he had so moved, the prosecution would probably have convinced the judge to reopen the proofs to supply the missing evidence.

¹ See *People v Mattie Harris*, unpublished opinion per curiam of the Court of Appeals issued Nov. 30, 2010 (Docket No. 294145) (attached).

TABLE OF AUTHORITIES

Cases

<i>People v Strawther</i> , 480 Mich 900 (2007)	i, 7
<i>Blockburger v United States</i> , 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).....	6
<i>People v Buck</i> , 197 Mich App 404 (1992).....	9, 12
<i>People v Calloway</i> , 469 Mich 448, 450 (2003)	6
<i>People v Carrick</i> , 220 Mich App 17 (1996).....	12
<i>People v Davis</i> , ___ Mich App ___ (2017).....	8
<i>People v Ellis</i> , 468 Mich 25 (2003)	8
<i>People v Fairbanks</i> , 165 Mich App 551 (1987).....	8
<i>People v Garland</i> , 286 Mich App 1 (2009).....	6
<i>People v Herron</i> , 464 Mich 593 (2001)	8
<i>People v LaVearn</i> , 448 Mich 207 (1995)	10
<i>People v LeBlanc</i> , 465 Mich 575 (2002)	10
<i>People v Lemmon</i> , 456 Mich 625 (1998)	11, 12
<i>People v Lewis</i> , 415 Mich 443 (1982)	8
<i>People v Perkins</i> , 473 Mich 626 (2005)	12
<i>People v Pickens</i> , 446 Mich 298 (1994)	11
<i>People v Robideau</i> , 419 Mich 458 (1984)	7
<i>People v Sierb</i> , 456 Mich 519 (1998)	5
<i>People v Smith</i> , 478 Mich 292 (2007)	6, 7
<i>People v Stanaway</i> , 446 Mich 643 (1994)	11
<i>People v Strickland</i> , 293 Mich App 393 (2011).....	i, 7

<i>People v Vaughn</i> , 409 Mich 463 (1980)	8
<i>People v Walker</i> , 461 Mich 908 (1999)	8
<i>Strickland v Washington</i> , 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).....	10
<i>Tryc v Michigan Veterans' Facility</i> , 451 Mich 129 (1996)	7

Statutes and Constitutional Provisions

MCL 28.424	12
MCL 750.224f.....	1, 12
MCL 750.224f(1).....	12
MCL 750.227	1
MCL 750.227b.....	1
MCL 750.82.....	i, 1
MCL 750.82(1)	5, 7
MCL 750.83.....	1
MCL 750.84.....	1, 5
MCL 75082(1)	5
MCL 777.224f.....	12
US Const Am VI, XIV	10

Rules

MCR 2.613(C)	10
MCR 6.419(A) and (B)	11

STATEMENT OF QUESTIONS PRESENTED

- I. IS A FELONIOUS ASSAULT, BY STATUTORY DEFINITION, A CRIME COMMITTED BY A PERSON WHO LACKS THE INTENT TO DO GREAT BODILY HARM? BECAUSE JUDGE SKUTT FOUND THAT DORIAN PRICE ACTED WITH THE INTENT TO DO GREAT BODILY HARM, AND THUS CONVICTED HIM OF ASSAULT WITH INTENT TO DO GREAT BODILY HARM, SHOULD HE HAVE ACQUITTED HIM OF FELONIOUS ASSAULT?
- A. DOES PUNISHMENT FOR BOTH OFFENSES VIOLATE DOUBLE JEOPARDY PRINCIPLES?
- B. WERE THE VERDICTS INCONSISTENT?
- II. WHERE THE PROSECUTION FAILED TO PRESENT EVIDENCE IN ITS CASE-IN-CHIEF TO SUPPORT THE FELON-IN-POSSESSION CHARGE, WAS COUNSEL INEFFECTIVE FOR NOT MOVING FOR A DIRECTED VERDICT BEFORE PUTTING ON A DEFENSE CASE THAT SUPPLIED THE MISSING EVIDENCE?

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

The Wayne County prosecutor accused defendant-appellant Dorian Lamarr Price Jr. of assault with intent to murder (AWIM),² assault with intent to do great bodily harm (AWIGBH),³ felonious assault,⁴ carrying a concealed weapon,⁵ felon-in-possession-of-a-firearm (felon-in-possession),⁶ and felony-firearm.⁷ After a bench trial, Wayne Circuit Judge Richard M. Skutt acquitted Mr. Price of AWIM but convicted him of the other offenses. Judge Skutt later sentenced Mr. Price to controlling consecutive prison terms of seven-to-fifteen years for AWIGBH and five years for felony-firearm (as a second offender).

Mr. Price appealed by right to the Michigan Court of Appeals, which, by a 2-1 vote, affirmed his convictions and sentences (see attached). He now seeks this Court's leave to appeal.

The criminal charges arose from an incident that began on September 26, 2014, when complainant Clyde Beauchamp and defendant-appellant Dorian Price first encountered one another. I 9.⁸ Beauchamp, a caretaker for four properties on Neff Street in Detroit, had arrived to do repair work at one of the houses when he saw Dorian Price and two or three others⁹ walking in the street. I 9. Price threatened to "beat his ass."¹⁰ I 10.

² MCL 750.83.

³ MCL 750.84.

⁴ MCL 750.82.

⁵ MCL 750.227.

⁶ MCL 750.224f.

⁷ MCL 750.227b.

⁸ References to the two-volume trial transcript are denoted by volume and page number.]

⁹ Beauchamp said Price was with "his girlfriend and his daughter—and somebody else." I 9. Price said he was with his sister and nephew. II 42.

¹⁰ Beauchamp claimed not to have known the reason for Price's threat. I 10. Price testified that he was responding to threats and insults Beauchamp had directed at his nephew and sister, motivated, Price had been told, by Beauchamp's belief that Price's nephew had stolen from one of the houses Beauchamp maintained. II 42-43.

They saw each other again a little later that day, and exchanged hostilities. II 19-20. Beauchamp produced a knife and told Price, “come on over here and let me let some air out your ass.” II 20. Price answered, “Oh, you going to bring a knife to a gunfight?” II 21.

Three days later, September 29, Beauchamp was headed to one of the four Neff Street houses when he saw Price again. I 10-11. He continued on his way, and saw that Price was following. I 11-12. Having parked his truck, he pulled a shotgun from the back of it and waited, gun hidden behind his leg. I 12-13, 31. When thirty-five or forty feet away, Price pulled a gun from his hoodie. I 14. Beauchamp in turn pulled the shotgun out into view. I 14.

At about this time Beauchamp heard a sound coming from next door, Price’s sister’s¹¹ house (II 44, 48). It was the sound of a gun racking. I 14. Beauchamp looked, and saw “the young man who stayed” next door coming out onto the front porch. I 14, 16.

Beauchamp issued a threat: “The first person I’m going to shoot is the—if you stick your head out the door.” I 16.

Beauchamp turned his head toward the front porch. It was then, he said, that Price fired three shots at him. I 16. One shot him in the chest. I 16, 18. He fired three shots back at Price, but missed. I 18.

Mr. Price, testifying in his own defense, said he was unarmed. I 51. When Beauchamp turned, so did he. I 51. As he began to walk away, he heard gunshots and ran. I 51. He didn’t

¹¹ When Mr. Price referred to his nephew’s mother as his “sister,” he apparently meant it as shorthand for “sister-in-law.” See II 39.

know where they were coming from. II 51. He didn't know if his nephew, the young man next door, had a gun or not. II 68.¹²

In its case in chief, the prosecution presented no evidence that Mr. Price was ineligible to possess a firearm. Counsel did not seek a directive verdict before putting on a defense case.

II 38. During the defense case, the prosecutor's cross-examination of Mr. Price established that as a teenager he'd had theft convictions, and that he'd also had three convictions for receiving and concealing stolen property, two of which involved stolen vehicles. II 52-53. On direct examination, he'd further acknowledged that he "cannot carry guns," because to do so would mean a five-year prison sentence. II 51.

Judge Skutt's verdict on the felonious-assault charge was as follows:

The assault with a dangerous weapon is just the attempt to commit a battery or placing a person a reasonable fear of an immediate battery with the intent to injure—and the ability to do so, and it's committed with a dangerous weapon. It is no longer considered a necessary lesser included offense so he's found guilty of that Count as well because there is—for the same reasons I indicated; there was an assault, there was a weapon used, there was a firing of the weapon at Mr. Beauchamp.

II 91.

His verdict on the felon-in-possession charge was as follows:

Felon in possession of a firearm I find a little bit harder because I don't think we ever stipulated to that. There was however testimony that he had previously been convicted of a felony—and admitted to by the Defendant, of receiving and concealing stolen

¹² A bystander used his cell phone to record a video that showed some, but not all, of what happened. The prosecution offered the recording in evidence, the judge admitted it, and the prosecutor played the recording during his redirect examination of Clyde Beauchamp. II 5, 10. Appellate counsel has obtained a copy of the prosecutor's exhibit through trial counsel, and will provide it to the Court under separate cover.

property which would have the same prohibition against possession, owing, using, transporting or selling a firearm—purchasing or selling a firearm in the State of Michigan. So I—and I’m trying to—he did admit to possession of stolen property; a motor vehicle, and he did testify that he’d previously been convicted of felony firearm. Again both of those, I think, would serve as a predicate felony for a felon in possession. So I will find him guilty of felon in possession of a firearm

II 91-92.

- I. BY STATUTORY DEFINITION, A FELONIOUS ASSAULT IS COMMITTED BY A PERSON WHO LACKS THE INTENT TO DO GREAT BODILY HARM. BECAUSE JUDGE SKUTT FOUND THAT DORIAN PRICE ACTED WITH THE INTENT TO DO GREAT BODILY HARM, AND THUS CONVICTED HIM OF ASSAULT WITH INTENT TO DO GREAT BODILY HARM, HE COULD NOT ALSO CONVICT HIM OF FELONIOUS ASSAULT.**

Introduction

A felonious assault is statutorily defined as an assault with a dangerous weapon by a person who acts “*without intending to commit murder or to inflict great bodily harm less than murder.*” MCL 750.82(1)¹³ (emphasis added). An assault with intent to do great bodily harm less than murder of course requires proof of “intent to do great bodily harm.” MCL 750.84. By finding Dorian Price guilty of both felonious assault and AWIGBH, Judge Skutt necessarily concluded that Dorian Price committed a single assault both with and without the intent to do great bodily harm less than murder. The judge’s verdicts were, in other words, inconsistent. Moreover, because the statutory language makes clear the legislative intent that a person who commits AWIGBH should not also be punished for felonious assault, the judge’s verdicts violate double jeopardy principles.

Standard of review

Whether verdicts were inconsistent is a question of law. Questions of law are reviewed de novo. *People v Sierb*, 456 Mich 519, 522 (1998). Whether two verdicts violate double

¹³ In full, MCL 750.82(1) provides that “[e]xcept as provided in subsection (2), a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2000.00, or both.”

jeopardy is also a question of law that is reviewed de novo. *People v Calloway*, 469 Mich 448, 450 (2003).¹⁴

Argument

A. PUNISHMENT FOR BOTH OFFENSES VIOLATES DOUBLE JEOPARDY PRINCIPLES.

The Double Jeopardy Clauses of the federal and state constitutions protect a defendant against, among other things, multiple punishments for the same offense. Whether an offense is the “same” for multiple-punishment double-jeopardy purposes turns on legislative intent. If the legislature intended multiple punishments, the Double Jeopardy Clause permits them. If the legislature did not, double jeopardy forbids them. *People v Garland*, 286 Mich App 1, 4-5 (2009).

A reviewing court’s first job, then, is to determine legislative intent. If the legislative intent is not clear from the statutory language, the court must determine the intent by applying the *Blockburger*¹⁵ test, which asks whether the elements of one conviction are completely subsumed within the other, or whether each offense contains an element not found in the other. *People v Smith*, 478 Mich 292, 316 (2007). In the former case, convictions and punishments for both offenses are forbidden; in the latter, they are permitted.

Here, application of the *Blockburger* test is unnecessary. The Michigan Legislature has made clear its intent that an assault committed with the intent to do great bodily harm less than murder (or with the intent to murder) should not be punished as felonious assault. By defining a felonious assault as an assault with a dangerous weapon by a person who acts “*without intending*

¹⁴ This is so even though counsel did not raise the issue below. The same was true in *Callaway*, in which this Court reviewed de novo. Compare *Callaway*, 469 Mich at 450 (de novo review), with the Court of Appeals decision of the same case, unpublished opinion per curiam, issued August 30, 2002 (Docket Nos. 232225, 232274) (applying plain-error review).

¹⁵ *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

to commit murder or to inflict great bodily harm less than murder,” the Legislature made clear that persons who *do* commit assaults while intending to murder or do great bodily harm should not be punished both for AWIM or AWIGBH and for felonious assault. MCL 750.82(1) (emphasis added).

Mr. Price acknowledges that a peremptory order of this Court has rejected a double-jeopardy claim involving the same conviction offenses. *People v Strawther*, 480 Mich 900 (2007).¹⁶ But *Strawther*, which did not consider the specific argument made here, should be overruled. The Court of Appeals had held that conviction for both crimes violated double jeopardy under the analysis set forth in *People v Robideau*, 419 Mich 458 (1984). *People v Strawther*, unpublished opinion per curiam, issued 2-13-2007 (Docket No. 265911) (Attachment 1), at page 2. While the prosecution’s application for leave to appeal was pending, the Supreme Court overruled *Robideau*. *Smith*, 478 Mich at 315. Rather than the grant the prosecutor’s *Strawther* leave application, the Supreme Court, citing *Smith* and applying *Blockburger*, peremptorily reversed. 480 Mich at 900. Because the lower court’s *Robideau*-inspired analysis never mentioned the explicit statutory expression of intent (again, that felonious assault is committed only by people who act “without intending to commit murder or to inflict great bodily harm less than murder”) the Supreme Court never considered whether that expression preempted the need for a *Blockburger* analysis. This Court has elsewhere recognized the inappropriateness of looking beyond statutory language to divine legislative intent if the meaning of the language itself is plain. *See, eg, Tryc v Michigan Veterans’ Facility*, 451 Mich 129, 135 (1996). Presumably, then, the Court would have reached a different result in *Strawther* had it focused its attention on that part of the felonious assault statute that makes clear that punishment is reserved for those who act *without* the intent to do great bodily harm.

¹⁶ *See also People v Strickland*, 293 Mich App 393, 401-02 (2011) (following *Strawther*).

The appropriate remedy is to dismiss and vacate the felonious-assault conviction. *Cf. People v Herron*, 464 Mich 593, 609 (2001) (appropriate remedy for multiple-punishment double-jeopardy violation is to “vacate the lower conviction”).

B. THE VERDICTS WERE INCONSISTENT.

Judge Skutt’s verdicts for AWIGBH and felonious assault were inconsistent. Verdicts are inconsistent when their factual underpinnings are inconsistent. *See, eg, People v Fairbanks*, 165 Mich App 551, 557 (1987). Here, Judge Skutt found that Mr. Price acted with the intent to commit great bodily harm, and thus convicted him of AWIGBH, but also convicted him of felonious assault—a crime that, by statutory definition, occurs when a person commits an assault with a dangerous weapon but *without* the intent to do great bodily harm. The factual underpinnings for the two verdicts were inconsistent.

A judge sitting at a bench trial, unlike a jury, is forbidden from rendering inconsistent verdicts. Inconsistent jury verdicts are tolerated because juries “are not held to any rules of logic,” but are instead allowed to compromise and to dispense mercy. *People v Vaughn*, 409 Mich 463, 466 (1980); *see also People v Lewis*, 415 Mich 443, 452-453 (1982). “Those considerations change when a case is tried by a judge sitting without a jury.” *Vaughn*, 409 Mich at 466. A “trial judge sitting as a finder of fact may *not* enter an inconsistent verdict.” *People v Ellis*, 468 Mich 25, 26 (2003) (quoting with approval *People v Walker*, 461 Mich 908 (1999)) (emphasis in original); *see also People v Davis*, ___ Mich App ___ (2017) (attached) (holding that defendant may not be convicted on basis of one act of two offenses with “mutually exclusive provisions”; in that case, AWIGBH and domestic-violence assault).

Mr. Price asks this Court to dismiss and vacate his felonious-assault conviction. He further seeks resentencing. As the Court of Appeals recognized in *People v Buck*, 197 Mich App 404, 431 (1992), a judge's choice of sentence for one conviction may have been affected by the sheer number of other convictions. Where one or more of those other convictions are vacated on appeal, it is appropriate to order resentencing on the remaining convictions.

II. WHERE THE PROSECUTION FAILED TO PRESENT EVIDENCE IN ITS CASE-IN-CHIEF TO SUPPORT THE FELON-IN-POSSESSION CHARGE, COUNSEL WAS INEFFECTIVE FOR NOT MOVING FOR A DIRECTED VERDICT BEFORE PUTTING ON A DEFENSE CASE THAT SUPPLIED THE MISSING EVIDENCE.

Introduction

The prosecution presented no evidence of the felon-in-possession charge in its case-in-chief. Trial counsel did not move for a directed verdict. Instead, counsel put on a defense case in which his only witness, his client, admitted prior felony convictions that made him subject to the felon-in-possession proscription.

Standard of review

A claim of ineffective assistance of counsel is reviewed under the two-part *Strickland* test described in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Ineffectiveness claims present mixed questions of law and fact. *Strickland*, 466 US at 698; *People v LeBlanc*, 465 Mich 575, 579 (2002). Questions of law are reviewed de novo. *LeBlanc*, *supra*. Questions of fact are reviewed for clear error. MCR 2.613(C); *LeBlanc*, *supra*.

Argument

Counsel was ineffective for not seeking a directed verdict after the prosecution failed to present evidence in support of his client's guilt on the felon-in-possession charge. The state and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const Am VI, XIV; Const 1963, art 1, §20. The test for determining ineffective assistance is twofold: whether "counsel's performance was deficient," and if so, whether his "deficient performance prejudiced the defense." *People v LaVearn*, 448 Mich 207, 213 (1995) (quoting *Strickland v Washington*, 466 US 668, 687 (1984)). Counsel's performance is deficient if it falls "below an objective standard of reasonableness under prevailing professional norms."

People v Stanaway, 446 Mich 643, 687 (1994). The defendant is prejudiced where “there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Stanaway*, 446 Mich at 687-88; *see also People v Pickens*, 446 Mich 298, 314, 326 (1994) (adopting *Strickland* prejudice standard as matter of state constitutional law).

Counsel here performed deficiently by not seeking a directed verdict after the prosecution rested. A defendant may move for a directed verdict after the prosecution has rested, after the defendant presents his proofs, or after a jury verdict is rendered. *See* MCR 6.419(A) and (B). If the evidence presented by the prosecution up to the time the motion is made, considered in the light most favorable to the prosecution, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict or judgment of acquittal must be entered. *See People v Lemmon*, 456 Mich 625, 633-634 (1998). As the judge acknowledged in his verdict, the prosecution offered no proof of the felon-in-possession charge in its case-in-chief. Had counsel moved for a directed verdict after the prosecution rested and before putting on a defense case, Mr. Price would have been entitled to a directed verdict of acquittal on the felon-in-possession charge.

Mr. Price suffered prejudice as a result. By putting Mr. Price on the stand to reveal his prior felony convictions, counsel supplied the missing evidence for the felon-in-possession

charge.¹⁷ No longer could Mr. Price move for a directed verdict. *See Lemmon*, 456 Mich at 634 (motion adjudged according to evidence presented “up to the time the motion is made”). Nor could he later argue on appeal that the evidence of guilt was insufficient. Counsel’s failure to seek a directed verdict at the close of the prosecution’s case—when his client was entitled to it—was objectively unreasonable and led to a different outcome.

There is no need to inquire of counsel’s motives, because there is no conceivable strategy by which counsel could have preferred not to defeat one of the charges against his client. *See People v Carrick*, 220 Mich App 17, 22 (1996) (no conceivable legitimate strategy for counsel not to make argument that would have prevented conviction). Counsel was ineffective. The felon-in-possession verdict must be vacated.

This Court should also order resentencing on the remaining charges. *See Buck*, 197 Mich App at 431 (where challenged convictions vacated, remanded for resentencing on companion conviction).

¹⁷ This analysis presumes that Judge Skutt correctly decided that the prosecution bore only the burden of proving that Mr. Price had committed a previous felony. True, the felon-in-possession statute does not prohibit every felon from ever possessing a firearm. If the previous felony is not a specified one, the felon regains the right to possess a firearm three years after paying all fines, serving all terms of imprisonment imposed, and satisfactorily completing all conditions of probation or parole. MCL 750.224f(1). If the previous felony *is* specified (and felony-firearm is, see MCL 777.224f(10)(c)), the felon regains the right five years after completing the same three conditions so long as that right has formally been restored by the process described in MCL 28.424. MCL 777.224f(2). But the prosecution does not bear the burden of proving anything more than the defendant’s status as a felon unless the defendant puts any of the accompanying conditions in issue. *See People v Perkins*, 473 Mich 626, 639-40 (2005) (placing burden on defendant to produce evidence of MCL 750.224f “proviso” before prosecution has burden to prove non-existence of proviso).

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks this Honorable Court to grant the relief requested herein, or appropriate peremptory relief.

Respectfully submitted,

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Dated: July 25, 2017

PROOF OF SERVICE

I hereby certify that on July 25, 2017, I electronically served the accompanying application on opposing counsel, Thomas M. Chambers of the Wayne County Prosecutor's Office, by including his name on the list of TrueFiled recipients, and that on the same date I served a notice of filing the application by mail with the clerks of the Court of Appeals and the trial court.

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